FILED
JUL 24 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1598

In the Supreme Court of the United States

DELIA RUIZ RIVERA,

Petitioner,

v.

PFIZER PHARMACEUTICALS, LLC,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether there is a split among the circuits regarding the treatment to be afforded perceived disability claims under the ADA which are based on a plaintiff's exclusive reliance on the employer's recognition of work restrictions imposed by the employee's treating physician in the context of a request for reasonable accommodation.

II. Whether Petitioner has presented compelling reasons to grant the petition where the First Circuit Court of Appeals' decision in connection to plaintiff's pleading shortcomings on a perceived disability theory of liability is in line with the Supreme Court decisions in Sutton and Twombly and Rule 8 of the Federal Rules of Civil Procedure, and, moreover, was only an alternative, procedural basis for upholding the dismissal of plaintiff's ADA claim.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pfizer Pharmaceuticals, LLC ("Pfizer") states as follows:

1. All interested parties to this proceeding are identified in the caption.

2. Pfizer is a Delaware corporation whose stock is wholly owned by Pfizer Inc, a publicly held corporation whose stock is traded in the NYSE.

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STATEMENT OF THE CASE

Ruiz began working for Pfizer in 1997, on a temporary basis, as a packaging operator at its Barceloneta, Puerto Rico, facility. Thereafter, towards the end of 1998, she became a regular employee and was assigned to the plant's bottling department. Her position required that she pour pills, bottles and caps, monitor the conveyor, pack and inspect the product, and clean the machinery. See Pet. App. at 2.

Beginning in August 1999, Ruiz took several consecutive medical leaves because of pregnancy-related conditions. She gave birth on December 31, 1999. See id. at 2-3. On February 25, 2000, upon the completion of her maternity leave, Ruiz submitted to Pfizer's in-house physician, Dr. Luis Félix, a medical certificate from her treating physician, Dr. Ramos, indicating she was being treated for carpal tunnel syndrome and lumbo sacral disc herniation. See id. at 3. Dr. Ramos indicated that Ruiz was fit to return to work, with specific limitations. He recommended that she avoid repetitive hand motions, placing her hands over her shoulders, lifting, pushing, holding and bending, and placed a twenty-five pound limitation on how much she could lift. See id. At the same time, Ruiz presented a medical certificate from a second physician, diagnosing her with major depression. Pfizer, accordingly, granted her an additional month of leave benefits. See id. at 3-4.

On March 27, 2000, Ruiz returned to work and insisted that Pfizer implement Dr. Ramos' earlier recommendations and work restrictions. See id. at 4. After consulting with the plant managers, Dr. Félix

informed her that there were no opportunities available at the plant where she could work with such stringent limitations. See id. He, nevertheless, agreed to confer with Dr. Ramos, and prepared for him a consultation form regarding Ruiz' condition, treatment options and rehabilitation opportunities. See id.

After an additional week of leave, Ruiz reported back and provided Dr. Félix with the consultation report which provided a diagnosis of left carpal tunnel syndrome, both wrists tendinitis and herniated discs. In addition, in order to prevent further deterioration of Ruiz' condition, Dr. Ramos restated the work restrictions listed in the February 24 medical certificate. Dr. Ramos further noted that the restrictions should last at least six months, "but may be longer." Id. at 4-5. Based on this information and the restrictions imposed by Dr. Ramos, Dr. Félix concluded that "in view of [these] recommendations and after conversations with [Ruiz'] work area supervisors where she cannot perform the essential tasks of her job and needs her hands I do not recommend a RTW [(return to work)] to prevent further aggravation or lesion. Case discussed [with] HR [(Human Resources)] for plan of action." Id. at 5.

Ruiz later spoke with Frances Guzmán, Pfizer's Assistant Personnel Manager, who advised her that Pfizer did not have to accommodate the restrictions imposed by her doctor because, in Guzmán's view, she was not disabled under the ADA. See id. As explained by Guzmán in her deposition:

> [B]ecause there is no permanent disability, and this is exactly how I explained it to her and is

> based on what her physician is saying. I do not have to make an accommodation under the ADA .... And then I explained that what her doctor is writing, in fact, she cannot perform the duties of a packaging operator . . . but that is not a qualified condition.

Id. at 5, n.1.

Ruiz asserts that Guzmán also told her that because of the conditions imposed by her physician, there was no opportunity for her to work at Pfizer or at any other pharmaceutical company. Guzmán recommended additional medical leave and that Ruiz seek non-occupational disability benefits. See id. at 6. Pfizer took no action to terminate Ruiz. See id.

Three months later, in a letter dated June 21, 2000, Pfizer requested that Ruiz return for a meeting to discuss her health and status. Ruiz responded by letter but did not accept Pfizer's request for a meeting. See id. On December 22, 2000, Pfizer sent a second letter requesting that plaintiff report to work on December 28, 2000. Ruiz did not appear for work nor did she excuse her absence. See id. at 31. Notwithstanding plaintiffs's failure to return to work, on January 16, 2001, Pfizer sent yet another letter requesting that Ruiz return to work by January 22, 2001, or she would be terminated. See id. at 32. Again, Ruiz did not call or return to work and her employment was, therefore, terminated. See id. at 6.

After exhausting administrative remedies, plaintiff filed a complaint in federal court. The Amended Complaint alleged numerous violations of federal and

Puerto Rico law, including the Americans with Disabilities Act ("ADA"). With respect to her claims under this statute, the Amended Complaint did not separate her failure to accommodate claim and her regarded as claim into distinct causes of action. There was no factual allegation that Ruiz had any non-limiting impairment which Pfizer wrongly regarded as limiting a major life activity—let alone a specific one—and nowhere averred that Pfizer had stereotyped her, mis-characterized or mis-perceived Ruiz' condition. The Amended Complaint's sole reference to perceived disability lay in paragraph 45, where it simply and conclusively stated that Pfizer had "intentionally discriminated against plaintiff because of her perceived disability." See Ct. Appeals' J.A. at 1-11.

On January 31, 2003, Pfizer filed a motion for summary judgment which essentially addressed plaintiff's contentions in connection to Pfizer's failure to provide a reasonable accommodation. See id. at 21-184. Ruiz opposed the motion and it is in the context of this opposition that Ruiz first spelled out her regarded as theory of liability—this, over Pfizer's strenuous but unsuccessful objections. See id. at 198-202.

On November 30, 2006, the United States District Court for the District of Puerto Rico issued an "Order in the Matter of Plaintiff's Disability Claim" and entered a partial judgment whereby it dismissed plaintiff's claims for failure to accommodate and termination due to disability, and denied it with respect to the plaintiff's claim for termination due to perceived disability. See Pet. App. at 26. With respect

to Ruiz' claim for disability discrimination, the District Court held that plaintiff had failed to establish she was disabled within the meaning of the ADA in order to trigger an obligation to provide reasonable accommodation. See id. at 47-48. As to plaintiff's claim for perceived disability, the District Court explained there were issues of fact regarding whether or not Pfizer perceived plaintiff as disabled and whether this mistaken belief had led to Ruiz' termination from employment. See id. at 50-51.

Pfizer filed a timely Motion for Reconsideration under the auspices of Rule 59(e) of the Federal Rules of Civil Procedure. See Ct. Appeals' J.A. at 376-86. In said motion, Pfizer requested that the District Court reconsider its decision regarding Ruiz' perceived disability claim inasmuch as the uncontested evidence on the record established there were non-discriminatory reasons for plaintiff's termination and that there was no evidence of pretext. See id. at 380-81. Pfizer further argued there was no evidence from which a reasonable fact-finder could conclude that Pfizer regarded Ruiz as disabled. See id. at 381-86. In this respect, Pfizer averred that plaintiff could not use statements made in connection to her request for reasonable accommodation in support of her claim for perceived disability. See id.

Plaintiff opposed this request, yet, on January 8, 2007, the Court granted Pfizer's motion and entered Judgment dismissing the remaining portions of plaintiff's case. See Pet. App. at 54. The dismissal was upheld on appeal before the First Circuit Court of Appeals. See id. at 25.

REASONS FOR DENYING THE PETITION

A. There is no Conflict Among the Circuits Regarding the Evidentiary Foundations of Perceived Disability Claims

Plaintiff's petition for certiorari review argues the First Circuit Court of Appeals' decision in the instant case "exacerbated" a conflict among the circuits. See Pet. Cert. at 8. According to Ruiz, "[t]here is a long standing conflict in the circuits regarding whether a plaintiff may rely on her employer's recognition of the restrictions imposed by her doctor to show the employer 'regarded' her as having a substantially limiting impairment under 42 U.S.C. § 12102(2)(C)." Id. at 9. More specifically, Ruiz points to the Third Circuit and Ninth Circuit decisions in Taylor v. Pathmark Stores, Inc., 177 F.3d 180 (3rd Cir. 1999), and Holihan v. Lucky Stores, Inc., 87 F.3d 362 (9th Cir. 1996), respectively, as conflicting with the Sixth, Eighth and Tenth Circuit decisions in Gruener v. Ohio Casualty Insurance, 510 F.3d 661 (6th Cir. 2008), Breitkreutz v. Cambrex Charles City, Inc., 450 F.3d 780 (8th Cir., 2006), and Lusk v. Ryder Integrated Logistics, 238 F.3d 1237 (10th Cir. 2001), which, according to plaintiff, the First Circuit now joined. A careful review of these five decisions reveals, however, that they are not in conflict.

The Third Circuit decision in Taylor was premised on the fact that the defendant in that case perceived the plaintiff as disabled "based on a *mistaken interpretation* of his medical records." 177 F.3d at 188 (emphasis added). In that case, notwithstanding the fact that plaintiff's treating physician had indicated

the restrictions were "temporary," the employer incorrectly interpreted them as being of a "permanent" nature. Id. The Court of Appeals, therefore, found that "a reasonable jury could conclude that Pathmark erroneously regarded him as disabled" and, therefore, reversed the grant of summary judgment with respect to the regarded as claim. Id. The Court explained that while "[a]n employer can rely on an employee's information about restrictions . . . it has to be right when it decides that those restrictions are permanent . . . ." Id. at 191-92.

The Court of Appeals' decision in the present case highlighted the fact that Ruiz "may not rely *exclusively* on her employer's recognition or implementation of the restrictions imposed by her own physician to establish a regarded as claim." Pet. App. at 20 (emphasis added). This simply does not conflict with the Third Circuit's decision in Taylor. As discussed above, the holding in Taylor was not based solely on the fact that the employer had relied on the medical information provided by plaintiff. Rather, it also considered the fact that the employer had *misinterpreted* this medical information. This stands in stark opposition to the facts of the instant case where, as noted by the First Circuit Court of Appeals,

> Ruiz . . . does not maintain that she *could* perform her job as packaging operator . . . . with the restrictions imposed by her doctor, but that Pfizer mistakenly believed her unable to do so; rather, she maintains that she could perform

> her job if granted the accommodations [to which she was not entitled].

Id. at 19.

Notably, the Taylor and Holihan decisions predate this Court's landmark decision in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).[1] To this effect, we submit that any possible conflict suggested by these two decisions was resolved by the reasoning in Sutton. This reality is more evident in the Holihan case, where the Ninth Circuit based its decision on the sole fact that the employer had received medical reports containing a diagnosis of depression, see 87 F.3d at 366, without passing over the employer's perception of substantial limitation in the major life activity of working or whether it was with respect to a broad class of jobs, as required by Sutton. See 527 U.S. at 491.

Moreover, this Court should further note the existence of two additional decisions from the Ninth Circuit, issued after Holihan, which suggest a position in line with the one adopted by the First Circuit in the instant case. More specifically, in Thompson v. Holy Family Hospital, 121 F.3d 537, 541 (9th Cir., 1997), the Ninth Circuit relied on the Eighth Circuit decision in Wooten v. Farmland Foods, 58 F.3d 381, 386 (8th Cir. 1995), and held that "an employer's decision to terminate an employee 'based upon the physical

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[1] This Court's decision in Sutton was issued on June 22, 1999, whereas Taylor was decided on May 19, 1999, and Holihan on June 29, 1996.

restrictions imposed by her doctor . . . does not indicate that [the employer] regarded [her] as having a substantially limiting impairment.'" Thompson, 121 F.3d at 541 (quoting Wooten, 58 F.3d at 386). Additionally, in Thornton v. McClatchy Newspapers, Inc., the Ninth Circuit noted that "when an employer takes steps to accommodate an employee's restrictions, it is not thereby conceding that the employee is disabled under the ADA or that it regards the employee as disabled." 261 F.3d 789, 798 (9th Cir. 2001).

Contrary to Ruiz' contentions in her petition, the First Circuit Court of Appeals' decision turned on the fact that plaintiff's *only* evidence of discrimination on the basis of perceived disability lay in Pfizer's recognition and implementation of the restrictions imposed by her own treating physician. See Pet. App. at 20. There is nothing in the opinion which suggests that evidence of this kind must be ignored, or never considered, in evaluating the ultimate issue of discriminatory intent. What the decision does is recognize that plaintiff failed to bring forth sufficient evidence which could lead a reasonable factfinder to conclude that discrimination on the basis of perceived disability was the reason for her termination from employment. See id. at 21. Thus, the decision is one based on the tried-and-true principles of McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), and its progeny, regarding a plaintiff's ultimate burden of proving intentional discrimination. See, e.g., Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) ("The ultimate burden of persuading the trier of fact that the

defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."). As has been previously explained by this Court:

> [w]hether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law [or, as in this case, one for summary judgment].[2]

Reeves, 530 U.S. at 148-49.

This is also the recognition of the Sixth, Eighth and Tenth Circuit cases of Gruener, 510 F.3d at 665, Breitkreutz, 450 F.3d at 784, and Lusk 238 F.3d at 1241—cases where the plaintiffs' claim of perceived disability was, not only based on the employer's statements made in connection to restrictions imposed by the particular employees' treating physicians, or in the context of reasonable accommodation efforts, but, more importantly, based on evidence which, *on its own*, is generally insufficient to carry the plaintiff's ultimate burden of proof regarding the issue of intentional discrimination. Additional cases along this

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[2] "[T]he standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" Reeves, 530 U.S. at 150 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986)).

line include, Cannon from the Sixth Circuit, Wooten v. Farmland Foods, 58 F.3d 382, 386 (8th Cir. 1995) (affirming summary judgment where "the evidence bearing on [defendant's] perception of [plaintiff's] impairment indicates that its . . . was not based upon speculation, stereotype, or myth, but upon a doctor's written restriction on [plaintiff's] physical abilities."), and Nuzum v. Ozark Automotive Distributors, Inc., 432 F.3d 839, 848-49 (8th Cir. 2005) (rejecting notion that employer's failure to provide reasonable accommodation constituted established that employee was regarded as disabled), from the Eighth Circuit, and Rakity v. Dillon Companies, Inc., 302 F.3d 1152, 1162-63 (10th Cir. 2002) (explaining that employer's statements recognizing treating physician's restrictions do not imply employee is substantially limited in his major life activities), from the Tenth Circuit.

B. The First Circuit Court of Appeals' Decision to Affirm the Grant of Summary Judgment Was Appropriate in Light of the Uncontested Evidence on the Record

In Murphy v. United Parcel Service, Inc., the Supreme Court explained that an employee's showing that he "is regarded as unable to perform the job of mechanic only when that job requires driving a commercial motor vehicle" is "insufficient to create a genuine issue of material fact as to whether [he] is regarded [by his employer] as unable to perform a class of jobs utilizing his skills." 527 U.S. 516, 524 (1999). It further held that "the undisputed record evidence demonstrat[ed] that [the employee was], at most, regarded as unable to perform a particular job"

and that, therefore, summary judgment was appropriately granted. Id. at 525.

The facts of the instant case are similar in the sense that, based solely on the work restrictions imposed by Ruiz' treating physician, Pfizer deemed plaintiff unable to perform the essential functions of *her particular job*. See Pet. App. at 17-18. Importantly, the undisputed record shows that Pfizer did not consider Ruiz' impairment to constitute a covered disability and, moréover, it did not terminate Ruiz' employment when it refused her the accommodation she requested. See id. at 19. Ruiz' reference to Guzmán's statement—one removed from any termination decision, made in response to the specific restrictions recommended by Ruiz' doctor and in connection to the denial of her request for an accommodation—are insufficient as a matter of law to carry plaintiff's burden of proving she was terminated because she was incorrectly regarded as disabled under the ADA.

Simply put, Ruiz cannot use Pfizer's lawful refusal to provide her with an accommodation as the basis for her regarded as claim. To allow this, "would be tantamount to allowing [Ruiz'] dismissed failure to accommodate claim in through the back-door." Id. at 21. This play on the particular circumstances of the case does not save plaintiff's termination claim for perceived disability from summary dismissal. The Court of Appeals decision to uphold was, accordingly, correct and should not be disturbed.

C. The First Circuit Court of Appeals' Decision Regarding Pleading Requirements Is in Line with this Court's Decisions in Sutton and Twombly and Rule 8 of the Federal Rules of Civil Procedure

Plaintiff also petitions this Court for certiorari review based on the First Circuit's interpretation of this Court's decision in Sutton v. United Air Lines, Inc. "that regarded as claims under the ADA require an even greater level of specificity [in pleading] than other claims." Plaintiff, however, ignoring the holdings of this Court in Sutton and, more recently, in Bell Atlantic Corporation v. Twombly, __U.S.__, 127 S. Ct. 1955, 1964-66 (2007), as well as the black and white realities of her Complaint, suggests this is tantamount to imposing a heightened standard of pleading. We disagree.

In her petition, Ruiz states that the First Circuit Court of Appeals did not deny that the Complaint contained a number of specific allegations concerning Ms. Ruiz' interactions with Pfizer's officials in their response to her diagnoses and acknowledged that at paragraph 45 of her Complaint she alleged "Pfizer terminated plaintiff because of her perceived disability." See Pet. Cert. at 19; Pet. App. at 14. The Court of Appeals, however, also noted that plaintiff's pleading with respect to her regarded as claim was altogether indistinct—so much so, that Pfizer was unaware such a claim had been raised. As a matter of fact, the conclusion at paragraph 45 of the Complaint is the *only* allegation made in the Complaint in connection to Ruiz' claim for perceived disability. See Ct. Appeals' J.A. at 7. No allegation was made with respect to the major life activity as to which Pfizer

mistakenly perceived plaintiff to be substantially limited in. Since no major life activity was identified in this respect, the Complaint also failed to state the nature of this perceived limitation such that would meet the ADA's requirement that it be a *substantial* limitation. Moreover, since plaintiff did not specifically allege Pfizer's mistaken perception related to the major life activity of "working," she did not, and, in a sense, could not include the minimum allegation, required by Sutton, that Pfizer perceived her as being unable to work in a broad class of jobs. See Sutton, 527 U.S. at 491.

The Supreme Court's decision in Sutton, recognizing the particularities of a perceived disability claim in the face of an employer's prerogative "to prefer some physical attributes over others and to establish physical criteria," made clear that "[a]n employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity." Id. at 490. Thus, an employer "is free to decide that some limiting, but not *substantially limiting*, impairments make individuals less than ideally suited for a job." Id. at 491. We submit, therefore, that this Court's decision in Sutton did not establish a heightened standard of pleading, but, rather, simply applied the standard of Rule 8 of the Federal Rules of Civil Procedure to ADA claims for perceived disability, affording due consideration to the particularities of such a claim when the allegation relates to the major life activity of working. As noted by the Supreme Court, the complaint's allegations in Sutton, when considered in tandem, simply did not state a claim upon which relief

could be granted because it nowhere stated that the employer regarded the Suttons' impairment as substantially limiting their ability to work. See id. Evidently, the employer perceived the plaintiffs' condition as precluding them from working in a particular job—that is why the job was not offered to them. The determinative factor, and what might render the employment decision discriminatory, is when the employer makes a decision based on its perception that the employee is *substantially limited from working in a broad class of jobs*. An allegation that does not take this distinction into account might be "short and plain," but will not "show," under Rule 8, that the pleader is entitled to relief under the ADA. See Fed. R. Civ. P. 8(a)(2).

This posture is further clarified in Twombly, where this Court explained that

> [w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

127 S.Ct. at 1265-66 (internal quotations omitted).

This is precisely the standard applied by the First Circuit Court of Appeals in the instant case. The

Court below did not require that Ruiz set out in detail the facts upon which she based her claim, but, rather, recognized[3] that the "mere inclusion of the word 'perceived' [in paragraph 45 of the Compliant] was not enough to put Pfizer on notice that Ruiz . . . was making a regarded as claim against it." Pet. Ap. at 16. The fact is that, under Rule 8(a)(2), Ruiz contentions in her complaint with respect to her perceived disability claim were so "short and plain" they simply did not "show" an entitlement to relief. The procedural record of the case speaks for itself and proves right the Court of Appeals' conclusion. This is, essentially, an issue of fair notice and, in this case, Ruiz' complaint simply did not put Pfizer on notice of her regarded as claim. The First Circuit Court of Appeals decision did not apply a heightened pleading standard, but, rather, decided the issue as one of fair notice, in accordance with the mandate of Rule 8 and this Court's decisions in Sutton and Twombly.

D. The Decision Below Does not Create a Conflict Among the Circuits Regarding the Pleading Requirements of Perceived Disability Claims Where the Perceived Limitation Relates to the Major Life Activity of Working.

In her petition, Ruiz suggests that the First Circuit's decision in the instant case creates a conflict with the decisions of the Sixth, Seventh and Ninth Circuits. We submit there is no such conflict. The

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[3] As discussed in part E, infra, this issue merely provided an alternative, procedural ground upon which the claim could have been subject to dismissal. See Pet. App. at 16.

three cases discussed by petitioner in her brief are clearly distinguishable from the facts of Sutton and the present case, which deal with an allegation of perceived disability from the major life activity of working.

The Sixth Circuit case of EEOC v. J.H. Routh Packing Co., was an enforcement action brought by the EEOC on behalf of the representative plaintiff and "all other similarly situated qualified individuals with disabilities." 246 F.3d 850, 851 (6th Cir. 2001). More importantly, it was not a perceived disability case. See id. At 852. Accordingly, the Sixth Circuit interpreted the application of Sutton only with respect to the pleading of corrective measures. See Id. at 854.

In Mattice v. Memorial Hospital, the Seventh Circuit Court of Appeals explained that, while the plaintiffs in Sutton alleged they were regarded as disabled from the major life activity of working, the plaintiff in Mattice claimed he was regarded as disabled from the major life activity of "cognitive thinking." 249 F.3d 682, 685 (9th Cir. 2007). The Seventh Circuit interpreted the Supreme Court's emphasis on the fact that the plaintiffs in Sutton had not argued that they were perceived as being disabled from the major life activity of seeing[4] to, instead, argue perceived disability from the major life activity of working, as demonstrative of the fact that Sutton's requirement of a specific allegation regarding the inability to work in a "broad class of jobs" was limited

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[4] An argument the Supreme Court characterized as the "obvious argument." Sutton, 527 U.S. at 490.

to cases dealing with this particular major life activity. See id. The case before us, however, is one that *does* deal with an allegation (albeit one that was not raised until the summary judgment stage) regarding perceived disability from the major life activity of working. The facts of Ruiz' case are, therefore, distinguishable from Mattice, and fall squarely within the holding of Sutton.

Finally, Skaff v. Meridien North America Beverly Hills LLC, presented a claim for injunctive relief under Title III of the ADA (the statute's public accommodations provision), as opposed to Title I (the statute's employment provision) implicated in the instant case. 506 F.3d 832, 836 (9th Cir. 20017). Moreover, the case did not deal with the issues of perceived disability or the major life activity of working. Again, the issue is distinguishable from Sutton and the facts of Ruiz' case, and does not conflict with the Court of Appeals' decision below.

E. Alternatively, the First Circuit Court of Appeals' Decision Regarding Plaintiff's Pleading Shortcomings Merely Provided an Alternative, Procedural, Basis to Uphold the Dismissal

It is important to note that, in the instant case, the insufficiency of plaintiff's pleading provided only an alternative, procedural ground for the summary dismissal of the regarded as claim. Different from Sutton, Twombly, J.H. Routh, and Mattice, cases which suffered dismissal on the pleadings for failure to state a claim, Ruiz' claim was dismissed on summary judgment for failing to bring forth sufficient evidence from which a reasonable jury could conclude

intentional discrimination on the basis of perceived disability. The procedural issue in Skaff, is also distinguishable, inasmuch as it dealt with the plaintiff's entitlement to an award of attorney's fees after a settlement agreement. The present case, therefore, provides a poor vehicle for addressing any confusion that might exist among the circuits in connection to the pleading requirements set forth in Sutton. The Court of Appeals decision in this case, should, therefore, not be disturbed.

CONCLUSION

Petitioner in the instant case has not established compelling reasons for this Honorable Court to exercise discretionary jurisdiction over Ruiz' dismissed Complaint. Indeed, Ruiz' claims were appropriately addressed by the District Court and the First Circuit Court of Appeals below, and should not be disturbed by this Honorable Court. Petitioner's petition for writ of certiorari should, accordingly, be denied.

This 24th day of July, 2008.

Respectfully submitted,

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